IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 27, 2001 Session

DAN MCCOY, ET AL. v. SUZI MIZELL

Appeal from the Circuit Court for Blount County
No. L-12414 W. Dale Young, Judge

FILED OCTOBER 30, 2001

No. E2001-00008-COA-R3-CV

This appeal involves the application of T.C.A. § 47-29-101, a statute dealing with civil liability for dishonored checks and drafts. The lessors of a residence sued their lessee alleging that the latter acted with "fraudulent intent" when she stopped payment on a rent check given to the plaintiffs. Following a bench trial, the court below found that the defendant's action in stopping payment on the $650 rent check triggered the provisions of T.C.A. § 47-29-101. The court awarded the plaintiffs the face amount of the check, as well as interest, treble damages capped at $500, and attorney's fees of $1,500 – a total of $2,720.52. In the same judgment, the court also awarded the plaintiff damages for breach of the lease, finding these damages – before the allowance of a credit to avoid a double recovery – to be $1,483.25. The defendant only appeals the judgment awarded under T.C.A. § 47-29-101. She argues that the trial court erred in its application of that statute to the facts of this case. The plaintiffs contend that the defendant's appeal is frivolous, thus entitling them to damages pursuant to the provisions of T.C.A. § 27-1-122.[1] We modify the judgment below to delete the award of $2,720.52 to the plaintiffs under T.C.A. § 47-29-101. This modification also requires us to modify the trial court's award for breach of the lease so as to increase that award to $1,493.25. As modified, the trial court's judgment is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed as Modified; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and D. MICHAEL SWINEY, J., joined.

R.D. Hash, Maryville, Tennessee, for the appellant, Suzi Mizell.

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[1] T.C.A. § 27-1-122 provides as follows:

> When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include, but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

John L. McCord, Knoxville, Tennessee, for the appellees, Dan and Jan McCoy.

OPINION

I. *Facts and Procedural History*

On November 1, 1998, the lessors, Dan McCoy ("Mr. McCoy") and Jan McCoy ("Mrs. McCoy") (collectively referred to as "the McCoys"), and the lessee, Suzi Mizell ("Mizell"), entered into an agreement for a month-to-month lease of a residence on the McCoys' property. Under the terms of the agreement, Mizell was to pay rent of $650 per month on the first day of the month. The lease also provided that Mizell would pay for her propane and utility services, said payments to be made directly to the service providers.

On September 1, 1999, Mizell received written notice from the McCoys to vacate the subject property no later than October 1, 1999. Because Mizell was unable to immediately find a new residence, she continued to reside in the property beyond the October 1, 1999, deadline. According to Mizell's testimony, Mr. McCoy had contacted Mizell on September 30, 1999, and, when she informed him of her situation, he told her that she had to be out of the house by October 15, 1999. Mr. McCoy also told Mizell to deal directly with Mrs. McCoy about any other issues involving the lease and her move. On October 1, 1999, the day following Mizell's conversation with Mr. McCoy, Mizell placed a $650 check in the McCoys' mailbox for the full amount of the October rent. Three days later, on October 4, 1999, Mrs. McCoy called Mizell to confirm that the latter would vacate the premises by October 15, 1999. At that time, *according to the testimony of Mrs. McCoy*, she informed Mizell that the McCoys would prorate the rent for October. When Mizell left the residence on October 15, 1999, she placed a check in the amount of $315, her estimate of the prorated rent for 15 days, in the McCoys' mailbox. Then – because she had paid what she believed to be the prorated rent for October – she stopped payment on the $650 check written on October 1, 1999. Mizell failed to inform the McCoys of her stop payment order.

After receiving the $315 check from Mizell, Mrs. McCoy, on October 18, 1999, deposited the $650 check. Furthermore, on October 25, 1999, Mrs. McCoy cashed the $315 check. Also on that day, Mrs. McCoy sent Mizell a certified letter containing a detailed breakdown of charges for which Mizell was allegedly responsible. The letter reflected charges totaling $700.61. These charges were for October rent ($325), trash collection, propane, and utilities. The breakdown in the letter also allowed Mizell a credit of $965 for the two checks. Transmitted with the letter was a check to Mizell for the difference of $264.39. This letter was returned to the McCoys unclaimed on November 13, 1999. Shortly after sending the detailed invoice to Mizell, Mrs. McCoy learned of the "stop payment" order on the $650 check and she retained an attorney to send a letter to Mizell demanding payment. Mizell responded to this letter by stating that because she had already fully paid the prorated rent on October 15, 1999, she did not owe the McCoys the $650 check.

On February 3, 2000, the McCoys filed suit against Mizell in the General Sessions Court for Blount County. The McCoys sued to recover a total of $2,473.25 plus court costs in an action based

upon two claims: 1) alleged property damage in the amount of $823.25, resulting from a breach of the lease by Mizell; and 2) collection of the dishonored $650 check, plus 10% interest; attorney's fees; treble damages capped at $500; and court costs, pursuant to T.C.A. § 47-29-101. As a result of Mizell's failure to appear in General Sessions Court, a default judgment was entered against her on June 5, 2000, ordering her to pay $2,517.58 plus costs.

Mizell appealed the judgment to the Circuit Court for Blount County. Following a bench trial on November 2, 2000, the trial court entered an order finding Mizell liable to the McCoys for damages in the amount of $1,483.25 caused by Mizell's breach of the lease. As for the McCoys' dishonored check claim, the court found that "the $650.00 check was stopped in bad faith with fraudulent intent, and in accordance to T.C.A. § 47-29-101 awarded the [McCoys] the face amount of the check, interest, and treble damages [limited to $500] in the total sum of $1220.52; and reasonable attorney's fees of $1,500.00, for a judgment thereunder in their favor in the sum of $2,720.52." In order to avoid a double recovery for the plaintiffs, the trial court gave the defendant a credit of $720.52 against the damage award of $1,483.25, said credit representing the $650 rent check and interest thereon. This resulted in a damage award of $762.73.

Mizell appeals the judgment of the trial court raising the issue of whether the trial court erred in its application of T.C.A. § 47-29-101. On appeal, however, Mizell does not contest the trial court's damage award of $762.73 to the McCoys for breach of the lease. Therefore, the only relevant facts to be considered on this appeal are those relating to Mizell's liability under T.C.A. § 47-29-101.

By way of a separate issue, the McCoys argue that Mizell does not have a "right" to bring this appeal because it is not a "valid or appropriate issue of law or fact to be considered or reviewed by the appellate court on appeal." Mizell's issue on appeal is phrased as follows: "Whether the trial court erred in its application of T.C.A. 47-29-101 (et seq.) to the facts, by awarding $3,483.25 to the Plaintiffs when the Plaintiffs had only sued for $2,473.25, plus court costs, which the Circuit Court awarded under the 'bad check' remedies under T.C.A. 47-29-101 et seq." The McCoys argue that this is "an erroneous statement because the trial court did not award Plaintiffs a judgment of $3,483.25 under T.C.A. § 47-29-101." We agree that the phrasing of defendant's issue is somewhat confusing; however, the substance of Mizell's appeal focuses on the trial court's award of $2,720.52 under T.C.A. § 47-29-101. The McCoys further argue that Mizell's appeal is "frivolous and is lacking in any justiciable issues and devoid of any merit, and there is no legal basis or dispute involving a legal issue."

II. *Standard of Review*

In this non-jury case, our review is *de novo* upon the record of the proceedings below; but the record comes to us with a presumption of correctness as to the trial court's factual determinations that we must honor unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); ***Wright v. City of Knoxville***, 898 S.W.2d 177, 181 (Tenn. 1995); ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993). The trial court's conclusions of law, however, are given no such presumption. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996).

III. *Law*

The McCoys brought the claim that is the subject of this appeal pursuant to T.C.A. § 47-29-101 (2000), which is a statute dealing with civil liability for dishonored checks and drafts. It provides, in pertinent part, as follows:

> (a) A person who, having executed and delivered to another person a check or draft drawn on or payable at a bank or other financial institution, *with fraudulent intent* either stops payment on the check or draft, or allows the check or draft to be dishonored by a financial institution because of lack of funds, failure to have an account, or lack of an authorized signature of the drawer or necessary endorser, is, if found liable to the holder on the check or draft in a civil action, liable for:
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> (1) The face amount of the check dishonored;
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> (2) Interest at the rate of ten percent (10%) per annum on the face amount or the remaining unpaid balance of the check or draft from the date of its execution until payment is made in full;
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> (3) Any reasonable service charges incurred by the payee in attempting to obtain payment by the bank or other financial institution;
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> (4) Court costs incurred in bringing the civil action which is brought by the holder to collect on the check or draft; and
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> (5) Reasonable attorney fees incurred by the holder.
>
> (b) This section does not apply to a person who has so allowed a check or draft to be dishonored if, within ten (10) days after the holder has given notice that the check or draft has not been paid by the financial institution, the person pays to the holder the full amount of the check or draft. Such a payment is effective for all purposes as of the date it is made.
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> (d) If the person who executed and delivered the check does not pay to the holder the full amount of the check or draft within thirty (30) days following certified mailing of written notice that the check or draft has not been paid and that treble damages will be sought, upon

> finding of fraudulent intent, the person is liable for, and the court shall award judgment for, treble the face amount of the check or draft. However, the amount awarded in addition to the face amount of the check or draft may not exceed five hundred dollars ($500).
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> (e) A person must elect whether to pursue the claim either under this section or under title 39, chapter 14, part 1.

(Emphasis added).

IV. *Discussion*

It is undisputed that Mizell issued a stop payment order on the $650 check. It is also undisputed that Mizell failed to pay the McCoys the full amount of the check within 30 days after receiving notice from the McCoys. *See* T.C.A. § 47-29-101(d). On appeal, the real issue is whether the evidence preponderates against the trial court's determination that Mizell acted with "fraudulent intent" in stopping payment on the $650 check. In this connection, it is important to note that "T.C.A. § 47-29-101 on its face requires fraudulent intent before its provisions come into play." ***LMI-Tennessee, Inc. v. J&B Co.***, C/A No. 01A01-9306-CV-00246, 1993 WL 496849, at *2 (Tenn. Ct. App. M.S., filed December 3, 1993); *see* T.C.A. § 47-29-101(a).

We examined the subject statute in the case of ***Thompson v. Adcox***, C/A No. E2000-01843-COA-R3-CV, 2001 WL 914004, at *6 (Tenn. Ct. App. E.S., filed August 13, 2001). In that case, we found that the defendant had acted with "fraudulent intent" under T.C.A. § 47-29-101 when he stopped payment on his check. We made this determination because the defendant wrote a postdated check to the plaintiff as a guarantee of repayment for a loan made by the plaintiff to a third party. When the third party failed to repay the loan when due, the defendant stopped payment on the check after receiving notice from the plaintiff of its nonpayment and he refused to make any payment toward the amount owed. ***Id.*** The Court found that it was reasonable to infer "fraudulent intent" based upon defendant's order to stop payment, and his refusal to pay the money for which he had originally contracted. ***Id***.

In the instant case, Mizell refused to satisfy the $650 check after receiving notice of nonpayment; however, unlike the defendant in ***Thompson***, the evidence presented at trial reveals that at the time Mizell stopped payment, and at the time she received notice demanding that she pay the full $650 or face the penalties of the statute, Mizell did not owe the McCoys on the obligation – October rent – for which the $650 check was originally written. First, it is undisputed that Mizell and the McCoys agreed in the lease that Mizell would pay rent to the McCoys, and that she would pay for utilities and propane usage directly to the service providers. Second, Mizell did not owe the full $650 rent for October. It is undisputed that the McCoys sent Mizell an invoice for a prorated rental amount of $325, not $650. Third, it is undisputed that Mizell gave the McCoys a $315 check before leaving the property and stopped payment on the $650 check. Given the fact that Mizell only

owed $325 in rent and that she left the McCoys a $315 check, Mizell, at most, owed $10 in rent when she moved out of the rental house and stopped payment on the $650 check.

During his ruling, the trial judge commented that

> the fact that Ms. Mizell testified that she had a conversation with Dan McCoy on September 30th about giving her 15 days that it did not make sense that she would give a $650.00 check the next day knowing the above and the fact that she stopped payment without notice showed bad faith.

Unlike the trial court, we find that the proof at trial does not indicate fraudulent intent or bad faith on the part of Mizell. Rather, the evidence shows that on the day that Mizell spoke with Mr. McCoy about an extension, there was no mention of a reduction in rent. Furthermore, Mr. McCoy told Mizell to talk to his wife about the termination of the lease, but he gave no indication that any portion of the rent for October would be abated. As a result, just as Mizell had done every month of the entire year of her lease, she placed a $650 check in the McCoys' mailbox on October 1, the first day of the month. At that time, she knew that she was going to remain on the property for 15 days, but there was nothing in the lease providing for a daily amount of rent. Furthermore, Mizell had not yet spoken with Mrs. McCoy.

Mrs. McCoy testified that on October 4, 1999, three days after Mizell had spoken with Mr. McCoy, she notified Mizell that "upon Ms. Mizell vacating the property that she would prorate the rent, balance out any of the utilities and any other amounts or remedies owed under the lease, and determine at that time any credits or debits between the parties." Based on the statement of the evidence, there is no indication that either Mrs. McCoy or Mizell made any mention of the McCoys retaining the $650 check at that time, or at any time thereafter.

The evidence reveals that on October 25, 1999, Mrs. McCoy sent Mizell, by certified mail, an itemized list of all amounts allegedly owed by Mizell. The list included $325 as the pro rata amount of rent from October 1 through October 15, 1999; a bill of $262.50 for propane use; two bills from the electric company totaling $97.11; and a bill of $16 for trash disposal. Apparently, these three bills had already been paid by the McCoys. On the invoice, Mrs. McCoy indicated that after subtracting the amount owed by Mizell from the $650 check and the $315 check, Mizell would receive a $264.39 refund. However, Mizell never agreed to pay for utilities or propane use directly to the McCoys. According to the terms of the lease agreement, Mizell agreed to pay monthly rent to the McCoys, and she agreed to directly pay the utility and propane companies any amount owed. In fact, the evidence at trial revealed that on October 30, 1999, Mizell attempted to pay the utility company for her October usage, but her payment was returned with a statement saying that the bill had already been paid. Instead of allowing Mizell to pay both the utility and propane companies directly, the McCoys took it upon themselves to change the terms of their agreement by paying the utility company and then trying to collect the money directly from Mizell. Nevertheless, it should be noted that Mizell does not dispute that she was responsible for paying for propane use, and she

agreed in court to satisfy that payment which is part of the $762.73 portion of the judgment from which she did not appeal.

We believe it is inappropriate to infer from the proof that Mizell acted with fraudulent intent in stopping payment on the check. The evidence preponderates that she was merely trying to comply with the agreement proposed by her landlord. The evidence preponderates that Mizell's true motivation for stopping payment was based on her understanding that the McCoys were going to prorate the October rent, which Mrs. McCoy had agreed to do and which the McCoys in fact did. Furthermore, Mizell did not know that the McCoys were going to alter the terms of the lease agreement by paying for her utilities and propane usage, and then try to obtain reimbursement from her. That had not been done in the entire year of Mizell's tenancy.

We find that the trial court was in error in applying the penalties of T.C.A. § 47-29-101 to the facts of this case. The penalties should only be applied if there is a finding of "fraudulent intent." We hold that the evidence preponderates against the trial court's finding that Mizell acted with "fraudulent intent" when she stopped payment on the $650 check.

In view of our decision in this case, we obviously do not find this appeal to be frivolous.

V. *Conclusion*

The judgment of the trial court is modified so as to vacate that portion of the decree awarding the plaintiffs damages of $2,720.52 under T.C.A. § 47-29-101. The judgment will be further modified to reinstate the original award for breach of the lease plus the $10 still due for October. Thus the final judgment for the plaintiffs is $1,493.25. As modified, the judgment is affirmed. On remand, the trial court will enter an order consistent with this opinion. Costs on appeal are taxed to the appellees, Dan and Jan McCoy.

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CHARLES D. SUSANO, JR., JUDGE